LeMond Cycling, Inc. v. Trek Bicycle Corporation Doc. 106

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| LeMond Cycling, Inc., | |
| Plaintiff, | Civil No. 08-1010 (RHK-JSM) |
| v. | Judge Richard H. Kyle<br>Magistrate Judge Janie S. Mayeron |
| Trek Bicycle Corporation, | |
| Defendant/Third-Party Plaintiff, | Date: May 26, 2009<br>Time: 10:30 a.m.<br>Judge: Janie S. Mayeron |
| v. | |
| Greg Lemond, | |
| Third-Party Defendant. | |

**MEMORANDUM OF LAW IN OPPOSITION TO TREK'S**
**MOTION FOR PROTECTIVE ORDER**

On April 8, 2008, Trek Bicycle Corporation ("Trek") held a media event at its headquarters during which its President, John Burke, gave a PowerPoint presentation and held a question and answer session regarding its relationship with LeMond Cycling, Inc. ("LeMond Cycling"). This entire media presentation was subsequently uploaded to YouTube.com, where it exists to this day. The media presentation was, in the words of John Burke, a one-sided effort to "tell the story from our point of view" regarding a licensor who was at the time poised to become a competitor. Prior to this media event, Trek had hired a public relations firm, Public Strategies, Inc., ("Public Strategies") in order to plan and execute the

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media presentation. By Trek's own admission, this effort likely "had a negative effect" on LeMond-branded products. LeMond Cycling has sought discovery related to the planning and development of this media effort, but Trek has refused, citing various privileges and, recently, relevance.

Through its Motion for Protective Order, Trek is attempting to avoid discovery of relevant information relating to its efforts to harm the LeMond brand. Contrary to Trek's assertions, communications with its public relations firm are directly relevant to the claims at issue in the present litigation, and Trek's blanket claims of privilege are improper. In fact, as evidenced by the testimony of Trek's President, Public Strategies was hired to do what any ordinary public relations firm would do: communicate Trek's version of the story to the public. Trek's effort with its Motion for Protective Order is a textbook instance of form over substance: Trek cannot claim privilege over communications with its public relations firm hired for a public-relations purpose merely because Public Strategies was hired by Trek's counsel. Because Trek has failed to establish the requisite elements of privilege relating to all communications with Public Strategies, Plaintiff requests that the Court deny Trek's Motion for Protective Order.

## BACKGROUND

As explained in previous memoranda, LeMond Cycling, the licensing company for cycling champion Greg LeMond, filed the present lawsuit after Trek breached the 1995 Sublicense Agreement and 1999 Amendment by failing to use its best efforts in the promotion and marketing of the LeMond brand. As is also explained in previous memoranda, Trek's unwillingness to support the LeMond brand consistent with contractual obligations resulted from pressure brought to bear on Trek by another of Trek's business partners, Lance Armstrong.

On April 8, 2008—just over two weeks after Trek was served with LeMond Cycling's Complaint on March 20—Trek held a media event to announce that it was ending its relationship with Greg LeMond, LeMond Cycling's namesake. In the days leading up to the event, Trek invited the media to attend or call in to its press conference without any indication of the focus for the media event. Trek video-recorded the ultimate presentation and subsequently posted the video-recording of the meeting along with Mr. Burke's PowerPoint presentation on YouTube. (*See* Trek Apr. 8, 2008 PowerPoint presentation, Media Notice, and YouTube videos at Declaration of Jennifer M. Robbins ("Robbins Decl.") Exs. 3, 2, 5; Burke Depo. at Robbins Decl. Ex. 1, at 80:22-81:6 (admitting his approval for posting the presentation on YouTube).) As of the filing of this Memorandum, the four respective YouTube videos had been viewed, respectively, 4,714, 2,830, 2,909, and 6,652 times. (YouTube.com "Trek Company Update" Parts 1-4, as of May 14, 2009 (attached at Robbins Decl. Ex. 8).) Public Strategies was involved in the preparation of Mr. Burke's PowerPoint presentation, as well as other documents such as press releases and letters to dealers.[1] (Burke Depo. at Robbins Decl. Ex. 1, at 71:12-25.)

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[1] Public Strategies is a public relations firm based in Austin, Texas with established affiliations with Lance Armstrong and the Bush Administration. *See,*

Plaintiff first became aware of Trek's relationship with Public Strategies during the April 7, 2009 deposition of Trek's President, John Burke. During the deposition, Mr. Burke testified that Public Strategies was asked to communicate Trek's story to the public:

> Q What – what did you ask the Public Strategies team to do?
>
> A I think what we asked the Public Strategies team to do is **here's the decision that has been made**, this is – **how should we best communicate it**. We're not communication professionals, and **we want to make sure that the story was properly presented**.

(Burke Depo., at Robbins Decl. Ex. 1, at 66:14-21 (emphasis added); *see also* 72:8-10 ("we wanted to make sure that we were **organized in how we put our message out**.") (emphasis added).) Other questions regarding Public Strategies' role were curtailed when Trek's counsel instructed Mr. Burke not to answer on the basis of attorney-client privilege.[2] (Burke Depo. at Robbins Decl. Ex. 1, at 69:21-70:3.) LeMond Cycling has also sought discovery into the documents related to this effort, and Trek has refused to respond. (Trek Mem. (Doc. No. 102), at 4, citing Weber Decl. (Doc. No. 103-7).)

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*e.g.*, Public Strategies Inc. online Bios of Dan Bartlett and Jack Martin at Robbins Decl. Ex. 13.

[2] This is consistent with Trek's overuse of privilege claims as to the role of its corporate counsel, Mr. Bob Burns. Just by way of example, Trek's counsel recently instructed a third-party witness not to answer a basic yes-or-no question as to whether the witness had knowledge of why part of one of his emails sent to Mr. Burns was redacted. (Langer Depo. at Robbins Decl. Ex. 6, at 49:12-25.) Trek has only recently completed the revision of its privilege log that it agreed to do in January, and LeMond Cycling anticipates that it will need to challenge Trek's current claims as to some of the roles played by Mr. Burns.

## **ARGUMENT**

Trek's claims that all communications with Public Strategies including those related to Trek's April 8, 2008 PowerPoint presentation—Trek's most public attempt to sabotage the LeMond brand—are without merit. A media campaign is not a litigation strategy. *Haugh v. Schroder Investment Mgmt. N. Am., Inc.*, No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (attached at Robbins Decl. Ex. 16). It is difficult to deny that the April 8, 2008 event was a blatant public relations effort completely unrelated to Trek's legal options. It is also difficult to deny that the PowerPoint cast conclusory, one-sided, and derogatory accusations on the namesake of a company that was poised to compete with Trek in the road-bike market after the termination of the parties' relationship. Finally, it is difficult to deny that Trek's presentation made damaging accusations about its licensor's namesake without adequate explanation of the context out of which the troubles between the parties emerged. (*See, e.g.*, Trek Apr. 8, 2008 PowerPoint presentation, at Robbins Decl. Ex. 3 (with quotation stating, "The guy is a legend and I have the utmost respect for what he has achieved in the sport but from a commercial perspective he's an idiot and I don't see any way back for us in Europe.").)

If one can use the media to publicly disparage a licensor that it is contractually obligated to promote, and then hide the details of this effort behind the fact that its counsel hired the public relations firm leading that effort, then our legal system is poised to become a defacto conduit for media exploitation.

Fortunately, the law does not support this outcome. Because the PowerPoint presentation and related media efforts cannot remotely be considered legal strategy or legal services, none of it can be protected by the claimed privileges.

## I. Communications with Public Strategies are Directly Relevant to Plaintiff's Claims.

In an effort to distract the Court from the fact that it has failed to establish the required elements of privilege for all communications with Public Strategies, Trek declares that such communications are irrelevant to the present litigation. Such a claim is incredible since Plaintiff's claims center around Trek's failure to exert best efforts to promote and market the LeMond brand, as well as Trek's persistent attempts to undermine Greg LeMond and his stance against the use of performance enhancing drugs in cycling. (*See* Compl. (Doc. No. 1-4), at ¶¶ 9, 22-23, 45, 70-77, 83-86, 90-111, 118-134, 138.) The timeline of facts relevant to Trek's breach of the parties' Agreement did not end when Plaintiff served its Complaint on March 20, 2008—a Complaint which sought, in part, ***an injunction to maintain the parties' relationship***. (*See* Compl. (Doc. No. 1-4), at ¶¶ 157-58.) Rather, Trek's most blatant act of sabotage—Trek's April 8, 2008 presentation—was still to come. Communications with Public Strategies regarding Trek's statements about the LeMond brand or Greg LeMond are relevant not only to Plaintiff's breach-of-contract claims, but also to Plaintiff's damages claims.

Because "the overriding purpose of the federal discovery rules is to promote full disclosure of all facts to aid in the fair, prompt and inexpensive disposition of lawsuits" discovery requests must be treated liberally. *Bredemus v. Int'l Paper Co.*, 252 F.R.D. 529, 533 (D. Minn. 2008) (attached at Robbins Decl. Ex. 14) (citing *Woldum v. Roverud Const. Inc.*, 43 F.R.D. 420, 420 (N.D. Iowa 1968)). And while relevancy "under Rule 26 is not without bounds," in this case a threshold showing of relevance has been made. *See id*. Indeed, Trek's assertion that communications with Public Strategies are irrelevant is directly contradicted by its own inclusion of at least some of those communications on its redaction log. In fact, oddly, Trek's logs are missing descriptions of communications with Public Strategies from before April 11, 2008, yet it catalogs several communications from dates subsequent to April 11. (*See generally* Trek's Third Revised Privilege Log, Robbins Decl. Ex. 10.) It appears that Trek wants it both ways: the public relations effort is irrelevant when the PowerPoint was being prepared, but communications with the same firm that developed the PowerPoint are apparently relevant after the media event.

## II. Trek has Failed to Establish All of the Required Elements for Protection Under the Work Product Doctrine and Attorney-Client Privilege.

Through its work product and privilege claims, Trek confuses instances where a proper legal purpose may require ancillary consultation with instances where the goal is truly one of public relations. The work done by Public Strategies regarding Trek's media presentation falls clearly into the second category. This is evident if one considers Trek's legal options at the time. Trek was served with a lawsuit that outlined the contours of a dispute that had been in play between the parties since 2004. (*See generally* LeMond 2004 Compl., Robbins Decl. at Ex. 7.) When developments in 2007 made clear that Trek's efforts had not improved, LeMond Cycling renewed its claims. Trek had the same legal options it had in 2004: answer the complaint and proceed through the courts or negotiate an amicable resolution. Trek elected to pursue a non-legal, public relations strategy that in part attempted to masquerade as a newly filed lawsuit in Trek's home venue. (*See* "Trek Bicycles sues to end relationship with Greg LeMond," April 8, 2008, Minnesota Public Radio at Robbins Decl. Ex. 12, at http://minnesota.publicradio.org/display/web/2008/04/08/treklemond/.) Even to some lay observers, this public relations move was barely transparent. (*See, e.g.*, Burke Depo. Ex. Nos. 138-150, attached at Robbins Decl. Ex. 4; *see also* Burke Depo. at Robbins Decl. Ex. 1, at 117:15-172:18 (discussing Ex. Nos. 138-150.) In short, in the eyes of at least some in the public, this was a blatant public relations strategy.

The work product doctrine protects materials prepared in anticipation of litigation from disclosure while the attorney-client privilege protects confidential communications between a client and his legal advisor. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602-03 (8th Cir. 1977). As the party claiming privilege, Trek has the burden of establishing all of the required elements for protection under either theory. *Isensee v. HO Sports Co.*, Civil No. 06-210 ADM/AJB, 2007 WL 1118274, at *2 (D. Minn. Apr. 13, 2007) (attached at Robbins Decl. Ex. 15) (citing *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985); *In re Grand Jury Proceedings*, 655 F.2d 882, 886-87 (8th Cir. 1981)).

In its Motion for Protective Order, Trek relies heavily on *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001). This reliance is misplaced for a myriad of reasons. First, as is eminently clear from that decision, any legitimate claim of attorney-client privilege must be based on a communication made for the purpose of facilitating the rendition of professional legal services. *See id*. at 217. Similarly, work product has to have a legal purpose related to the litigation; put another way, "the purpose of the [work product] rule is to provide a zone of privacy for strategizing about the *conduct of litigation itself*, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (internal citations omitted) (emphasis added). Such is clearly not the case where, as here, the explicit purpose is that of a traditional public relations function: telling a story to the public. In no way can preparation for a PowerPoint presentation to the public at large be considered strategizing about the conduct of litigation itself.

In addition, in *In re Copper*, the work product protection and attorney-client privilege were established through a proper privilege log, while purely business-related documents or other non-privileged communications were not withheld at all. 200 F.R.D. at 221. In other words, as LeMond Cycling asks of this Court, *In re Copper* rightly recognized the distinction between instances where the work of a non-legal professional is made for a legal purpose and where it is made for a business-related purpose. Here, Trek is claiming protection over **all** communications with Public Strategies. And although Mr. Burke listed three people from Public Strategies who were part of the public relations team, none of those people is identified on Trek's logs. (*See* Trek's Privilege and Redaction Log Index at Robbins Decl. Ex. 11; *see also* Burke Depo. at Robbins Decl. Ex. 1, at 64:21-25.) The only people from Public Strategies on Trek's logs are Sarah Graham and R. Hinkle, neither of whom is listed in connection with any communications before April 11, 2008—over a week after Public Strategies was hired by Trek, and three days after the April 8, 2008 PowerPoint presentation. (*See* Trek's Second Revised Redaction Log, Robbins Decl. Ex. 9, at 3, 12.)

Two years after the Southern District of New York decided *In re Copper*, it again weighed in on the issue of privilege as applied to communications with public relations firms, finding that privilege does not apply when communications are not "materially different from those that any ordinary public relations advisor would perform." *Haugh*, No. 02 Civ. 7955 DLC, 2003 WL 21998674, at *3; *see also In re New York ReNu with Moistureloc Product Liability Litig.*, No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *7 (D.S.C. May 8, 2008) (stating that "[m]ost courts agree . . . that basic public relations advice, from a consultant hired by the corporate client, is not within the privilege") (attached at Robbins Decl. Ex. 17).

In *Haugh*, the Court required the party asserting privilege to identify "legal advice that required the assistance of a public relations consultant" such as a "nexus between the consultant's work and the attorney's role in preparing" either the complaint or the case for court. 2003 WL 21998674 at *3 (citing *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. at 55). The only descriptions provided in that case stated that the consultant was hired to provide media strategy as it impacted litigation, participate in strategy sessions, and review materials for impact on litigation strategy. *Id*. at *1. In finding that the party failed to establish the required nexus, the Court stated that "[a] media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." *Id.* at *3. Similarly Trek's privilege claims regarding Public Strategies' assistance with "Trek's litigation message" (Weber Decl. (Doc. No. 103), at ¶ 6) or generic efforts to ensure that Trek's "story was properly presented" (Burke Depo., at Robbins Decl. Ex. 1, at 66:14-21) do not meet the initial litmus test of being related to "legal advice." Rather, those communications are related only to Trek's media campaign and should be discoverable. Trek's April 8, 2008 presentation was not a legal decision at all—it was a business decision made to effect the most damage on the brand of a future competitor—and should also be discoverable.

Even if the matters at issue are somehow privileged, where a party voluntarily or involuntarily discloses privileged information to a third-party, that privilege can be waived. *See NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 138 (N.D.N.Y. 2007). Trek claims that the Court need only read the written agreement between Trek's counsel and Public Strategies to see that Public Strategies was retained in anticipation of litigation; however, merely stating that there is privilege does not and cannot by itself create privilege. *NXIVM Corp.*, 241 F.R.D. at 140 (stating that "blanket confidentiality clauses invoking the attorney-client privilege and work-product doctrine do not necessarily make it so."). Instead, waiver can exist and, in this case, does. Waiver of privilege "depends upon the circumstances and each case is judged on its own facts." *Id.* at 142 (citing *U.S. v. Nobles*, 422 U.S. at 239-42, 95 S.Ct. 2160). As explained above, because communications with Public Strategies did not in any way aid in the rendering of legal services, and instead were entirely for the purposes of a media campaign, any privilege that may have existed was waived when transmitted to Public Strategies.

Finally, even assuming that the communications at issue are in fact protected by the work product privilege (which they are not) and that any privilege was not waived (which it was), Plaintiff has a substantial need to access these communications and they cannot be obtained through other means. The relevant matters are intimately related to one of Plaintiff's most essential claims – the facts relating to an instance of Trek's failure of its obligation of good faith and fair dealing via actively damaging the LeMond brand through statements made in some of the most public forums available. Without access to the communications at issue, Plaintiff has no other means of discovering the facts underlying this deliberate act of sabotage as any and all information relating to these issues are fully within the hands of the Defendant.

## CONCLUSION

Trek cannot engage in public efforts to damage the LeMond brand and then attempt to avoid discovery of such relevant information by making a blanket claim of privilege over all communications with its public relations firm. For the foregoing reasons, Plaintiff respectfully requests that this Court enter an order denying Trek's Motion for Protective Order.

Dated: May 15, 2009

**ROBINS, KAPLAN, MILLER & CIRESI L.L.P**

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